Supreme Court, U.S.
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No. 02-567

IN THE

Supreme Court of the United States

DEE and DON HOLLANDER,

Petitioners,

v.

SANDOZ PHARMACEUTICALS CORPORATION, a New Jersey corporation; SANDOZ LTD., a foreign corporation; and HCA HEALTH SERVICES OF OKLAHOMA, INC., an Oklahoma corporation, d/b/a PRESBYTERIAN HOSPITAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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I.

Federal Jurisdiction Could Only Be Premised Upon Don Hollander Moving to Arkansas.

Respondent states that the Court of Appeals did not rely upon Don Hollander's move to Arkansas as a ground for maintenance of federal court jurisdiction. Compare Pet. at 20a. For this to be true, one of two facts must exist for federal court jurisdiction to be maintained. HCA must have either been fraudulently joined or voluntarily dismissed. The record indicates, however, that neither of these facts exists.

It is true that if HCA had been fraudulently joined to the action, then its citizenship could have been ignored for diversity purposes. *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146 (1914). As such, federal diversity jurisdiction would have existed.

However, the Court of Appeals never held that HCA was fraudulently joined. Rather, the Court of Appeals concluded that "Oklahoma courts do not appear to have answered" the question of whether the hospital could be liable. Pet. at 54a. The Court of Appeals does go on to state that it has "no reason to believe" that Oklahoma courts would rule in favor of the Hollanders on the question of whether HCA could be liable, because non-liability of a hospital under these circumstances is the majority rule. Pet. at 54a.

But the point for federal jurisdiction purposes is not whether Oklahoma would follow the majority rule in an as-yet-undecided issue; the question is whether the argument is so frivolous that it can be rejected out of hand. The Court

of Appeals decision was far from holding that the issue was so frivolous as to justify ignoring the citizenship of the hospital.

The other way federal court jurisdiction could have been maintained in the face of the Oklahoma citizenships of Don Hollander and HCA would have been for a dismissal as to HCA to have been effected so that its citizenship could be ignored. For example, in *Caterpillar*, the non-diverse defendant was dismissed by the plaintiff upon settlement, thus giving rise, under a line of this Court's precedent, to the conclusion that its citizenship could be ignored.

But there is also a line of Supreme Court jurisprudence to the effect that where the non-diverse defendant is *involuntarily* dismissed, because that dismissal might be reversed on appeal, federal court jurisdiction is not maintained. *Whitcomb v. Smith & Son*, 175 U.S. 635 (1900); *American Car & Foundry Co. v. Kettelhacke*, 236 U.S. 311 (1915). This rule has continued to be followed in the Tenth Circuit, although ignored by the Court of Appeals in this case. *DeBry v. Transamerica Corp.*, 601 F.2d 480, 486-488 (10th Cir. 1979). The Court of Appeals' statement that it can ignore HCA's jurisdiction because Sandoz Pharmaceuticals was the sole remaining defendant[1] ignores this line of cases. Pet. at 20a.

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1. The statement that HCA no longer remained is contrary to the order of dismissal found at Pet. 58a-59a. The order was clearly non-final pursuant to 12 O.S. § 994.A. See Appendix hereto.

That HCA remained a party to the case is also shown by its participation in the *federal* appeal. Judgment in favor of HCA was affirmed in the Court of Appeals on the grounds that the decision as to it would have been no different on the scientific evidence from that against Sandoz Pharmaceuticals. Pet. 52a-54a.

In short, Federal court jurisdiction could not have been maintained on the alternative ground that HCA was no longer a party to the lawsuit because it had neither been fraudulently joined nor voluntarily dismissed. *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), was misapplied to this case.

II.

The *Daubert* Ruling Does Not Make Remand to State Court Useless.

Sandoz argues that regardless of whether the federal courts had jurisdiction over this case or not, the Court of Appeals decision on the *Daubert* issues would make remand a useless act. Petitioners submit that this is far from clear. Two grounds exist for their position. First, Oklahoma summary judgment jurisprudence, while modeled on federal summary judgment jurisprudence, is handled differently. Second, how Oklahoma state courts would apply *Daubert* to this case is far from clear.

The Oklahoma Supreme Court has acknowledged that its summary judgment jurisprudence is modeled after the federal system. *Poafpybitty v. Skelly Oil Company*, 517 P.2d 432, 434 (Okl. 1973). Nevertheless, Oklahoma courts have specifically rejected the *Celotex* trilogy. *Kating v. City of Pryor*, 1999 OK Civ. Pet. 26, 977 P.2d 1142, 1144. The burden on summary judgment in Oklahoma is on the moving party to entirely eliminate some or all fact issues, not on the suing party to show it has evidence to reach a jury. *Russell v. Bd. of County Commissioners*, 1997 OK 80, 952 P.2d 492, 496-497.

Even in federal court, *Daubert* decisions are not matters of law, but of discretion. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). Thus, although some federal courts have refused to allow Parlodel cases to go to the jury, other courts have gone the other way. Pet. 28a. As the Court of Appeals acknowledged here, *Daubert* rulings are a matter of judicial discretion — different judges can and do rule different ways on the same evidence. Pet. 27a-28a.

Even on the merits of whether a Parlodel case such as this should be allowed to go to the jury, the Court of Appeals' *Hollander* decision has been roundly criticized in one prestigious medical publication as being unfaithful to *Daubert*. *Journal of the American Medical Association*, Vol. 288, No. 11, pp. 1382-1387 (2002). It is far from clear that the Oklahoma courts would merely rubber stamp a discretionary decision by the federal district court — one "not faithful to the mandate of [this Court]." *Ibid.* at 1382.

CONCLUSION

Petitioners request this Court to grant *certiorari* to address and clarify the issue of federal court jurisdiction post-*Caterpillar*.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTE

12 O.S. § 994.A.

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or *when multiple parties are involved*, the court may direct the preparation and filing of a final judgment, decree or final order as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the filing of a final judgment, decree or final order. *In the absence of such determination and direction, any order* or other form of decision, however designated, *which adjudicates* fewer than all the claims or *the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties*, and the order or other form of decision is subject to revision at any time before the final judgment, decree or final order adjudicating all the claims and the rights and liabilities of all the parties is filed with the court clerk.

(Emphasis supplied.)